Acquisition Ethics Training

2005

OVERVIEW

- Introduction
- Procurement Integrity Act (PIA)
- Role of the COR/COTR
- Government Purchase Cards
- Bribery
- Gifts
- Allowing for “Time-Off”

Overview (Continued)

- Traveling with Contractors
- Recommendation For Contractor Personnel
- Organizational Conflicts of Interest
- Seeking Employment
- Working for Contractors after Government Employment
- Ethics Decision-Making

Introduction

Working with Contractors in the Federal Workplace

Why Are We Here?

Ex-Air Force Official Gets Prison Time

Boeing Received Special Treatment in Procurement

By Renae Merle and Jerry Markon
Washington Post Staff Writer

Saturday, October 2,2004; Page A01

Facts

The defendant, since July 28, 2004, **now acknowledges that she did favor the Boeing Company in certain negotiations as a result of her employment negotiations and other favors provided by Boeing to the defendant.** Defendant acknowledges that Boeing's employment of her future son-in-law and her daughter in 2000, at the defendant's request, along with the defendant's desire to be employed by Boeing, influenced her government decisions in matters affecting Boeing. That as a result of the loss of her objectivity, she took actions which harmed the United States to include the following:

Facts

In negotiations with Boeing concerning the lease agreement for 100 Boeing KC 767A tanker aircraft, the defendant agreed to a higher price for the aircraft than she believed was appropriate. The defendant did so, in her view, as a "parting gift to Boeing" and because of her desire to ingratiate herself with Boeing, her future employer. The defendant also now acknowledges providing to Boeing during the negotiations what at the time she considered to be proprietary pricing data supplied by another aircraft manufacturer.

But there's more!

During 2002 the defendant, as chairperson of the NATO Airborne Early Warning and Control Program Management Board of Directors, was involved in negotiations with Boeing concerning a restructuring of the NATO AWACS program. The **defendant negotiated a payment of 100 million dollars to Boeing as part of that restructuring. The defendant now acknowledges that at the time she believed a lower amount to be an appropriate settlement** and she did not act in the best interest of the United States and NATO. Her agreement to the 100 million dollar settlement was influenced by her daughter's and son-in-law's relationship with Boeing and the employment negotiations.

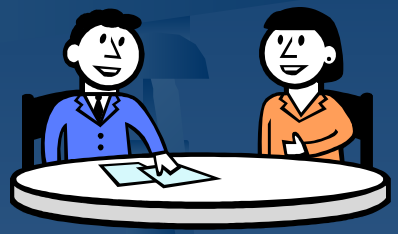
And More!

During 2000 the defendant negotiated a settlement with Boeing concerning the C-17 H22 contract clause with a senior executive of Boeing. These negotiations occurred at the time the defendant was seeking employment at Boeing for her daughter's boyfriend. **The defendant's decision to agree to a payment of approximately 412 million dollars to Boeing in connection with the C-17 H22 clause was influenced by Boeing's assistance to the defendant.**

New Workplace

Changing Workplace

- Contractors Support DoD Mission
- Contractors are Perceived as “Partners”



Unchanging Laws

- Fundamental Differences
- Legal and Ethical Limitations

Investigations Reveal

“The lines became too easy to cross, and no one was paying attention. I don't even think most people know where the lines are anymore."

Goals

- Re-establish the Lines
- Recognize when contractors and Federal employees must be distinguished

WHY?

- Generally, conflict of interest laws and the Standards of Ethical Conduct do not apply to contractor employees, even when:
  - Performing the same/similar work
  - Working side-by-side in the Federal workplace, contractor workplace, or in the field
- Different Loyalties
- Result? Ethical Issues and actual or apparent conflicts of interest

Oath of Office

Officers and Army Civilians

"I do solemnly swear/affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. So help me God."

Oath of Enlistment

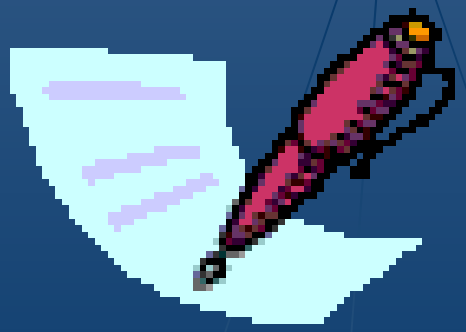
Enlisted Members

"I do solemnly swear/affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

The Contractor's Oath

The Bottom Line

Procurement Integrity Act



Resources

- 41 USC 423 - the current version of the PIA went into effect on 1 Jan 97
- Implemented by FAR 3.104, DFAR Part 203, and AFAR Part 5102

Bans

- Disclosing bid proposal or source selection information (for competitive procurements)
- Obtaining bid proposal or source selection information (for competitive procurements)
- Accepting compensation from certain contractors after leaving Federal employment
- Discussing non-Federal employment with certain bidders or offerors

Who does it Apply To?

The ban applies to:

- Current Federal employees and military personnel
- Former Federal employees and military personnel
- Individuals (such as contractor employees) who are currently advising the government regarding the procurement
- Individuals (such as contractor employees) who have advised the government regarding the procurement but are no longer doing so

Proposal or Bid Information

- Cost or price data, including indirect costs and direct labor rates
- Proprietary information about manufacturing process, operations, or techniques identified by the contractor
- Information identified by any contractor as “contractor bid or proposal information”

What is Source Selection Information (SSI)

- Bid prices
- Proposed costs or prices
- Source selection plans
- Technical evaluation plans
- Technical and cost or price evaluation proposals
- Competitive range determinations

SSI Continued

- Rankings of bids, proposals, competitors
- Reports and evaluations of source selection panels, boards, or advisory councils
- Other “source selection information” if:

  (A) contracting officer has determined that its disclosure would jeopardize the integrity of the procurement **and**

  (B) it is marked with “source selection information – See FAR 3.104”

Definition of Contractor Bid or Proposal Information (CBPI)

- CBPI means any of five types of information:
  - Cost or pricing data
  - Indirect costs & direct labor rates, and overhead rates
  - Proprietary information about manufacturing processes, operations or techniques marked by the contractor

Definition of CBPI Continued

- Information marked by the contractor as “contractor bid or proposal information”
- Information marked by the contractor IAW FAR clause 52.215-12, entitled “restriction on disclosure and use of data”

What Are Not Violations of the Disclosure Ban?

- Information already disclosed publicly or made available to public
- Information disclosed by contractors. They are not prohibited from disclosing their own CBPI
- SSI & CBPI information disclosed, pursuant to a proper request, to Congress, the Comptroller General, or the inspector general (provided the SSI or CBPI is highlighted and notice given that disclosure is restricted by PIA.)

Penalties for Disclosing or Obtaining SSI or CBPI

Criminal

- Criminal, if an individual or organization improperly discloses or obtains SSI or CBPI –
  - In exchange for anything of value, or
  - In order to obtain for himself, or give to anyone else, a competitive advantage in the award of a Federal contract.

Five years in prison, or a fine, or both.

Civil Penalties

Civil Penalties

- Each knowing violation of any of the four key provisions -- up to $50,000 per violation and administration actions.
- Up to $50,000 per violation plus twice the amount of compensation an individual received or offered for the prohibited conduct.
- Up to $500,000 per violation plus twice the amount of compensation an organization received or offered for the prohibited conduct.

Administrative Actions

Administrative Actions

- Cancellation of the procurement.
- Disqualification of an offeror.
- Rescission of the contract.
- Suspension or debarment of the contractor.
- Initiation of an adverse personnel action.
- Any other action in the best interest of the Government.

Post-employment
1-year Compensation Ban

Generally,

- Federal employees who serve in one of seven positions, or who make one of seven types of decisions, on a contract over $10 million, may not accept compensation from the contractor for 1 year as an employee, consultant, officer or director
- Ban can apply to officers, enlisted & civilians

The 7 Positions

- Procuring contracting officer
- Source selection authority
- Member of source selection evaluation board
- Chief of financial or technical evaluation team
- Program manager
- Deputy program manager
- Administrative contracting officer

$10 Million Threshold

- Decision to award a contract over $10 million (including options, and estimated value of all task orders under IDIQ/requirements contracts)
- Decision to award a subcontract over $10 million
- Decision to award a modification that is over $10 million of a contract or subcontract
- Decision to award a task order or delivery order over $10 million

$10 Million Threshold (Continued)

- Decision to establish overhead or other rates applicable to a contract or contracts valued over $10 million
- Decision to approve issuance of a contract payment or payments over $10 million
- Decision to pay or settle claim over $10 million

Anything Else?

- One year begins ------
- Inapplicable to divisions or affiliates of a contractor that do not produce the same or similar products

Role of COR/COTR

Role of the COR/COTR

- Strictly speaking, the term COR refers to a person designated by the Contracting Officer to perform certain administrative tasks related to a specific contract in accordance with Subsection 201.602-2 of the Defense Federal Acquisition Regulation Supplement (DFARS)
- See http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/dfars/Dfars201.htm#P255_14285

Who is a COR/COTR

- Designated by contracting officer (KO) to assist in the technical monitoring or administration of a contract.

- Designation must be in writing
  - See AFARS 5153.9001 -- Sample COR designation.

COR/COTR

- Must be a Government employee.
- Must be qualified by training and experience.
- May not be delegated authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract.
- Must maintain a file for each contract assigned.

Overall Duties of COR/COTR

- Generally, responsibilities vary with the type of contract and complexity of the acquisition.
- Normally, has the responsibility/authority to monitor all aspects of the day-to-day administration of a contract except issues that deal with “time and money.

Specific Duties of COR/COTR

- Monitoring the contractor's progress and performance, including the submission of required reports or other documentation.
- Perform, or cause to be performed, all necessary inspections.
- Verify that the contractor has corrected all correctable deficiencies.
- Perform acceptance for the government of supplies and services received.

Specific Duties (Continued)

- Maintain liaison and direct communications with both the contractor and the contracting officer.
- ***Recommend*** to the KO contract modifications and termination actions.
- Provide technical interpretation of the requirements.
- Report any instance of suspected conflict of interest or fraud, waste, and abuse to the local contracting attorney who supports the contracting officer.

COR/COTR
May Not

- Award, agree to, or sign any contract, delivery order or task order. All contractual agreements, commitments, or modifications shall be made only by the KO.
- Make any commitments or otherwise obligate the Government to make any changes to the contract.
- Grant deviations from or waive any terms and conditions of the contract.
- Impose or place a demand upon the Contractor to perform any task or permit any substitution not specifically provided for in the contract.

May Not (Continued)

- Increase the dollar limit of the contract, or authorize work beyond the dollar limit of the contract, or authorize the expenditure of funds.
- Give direction to the Contractor or to the employees of the Contractor except as provided for in the contract.
- Change the period of performance.
- Authorize the purchase of equipment, except as authorized under the contract.

May Not (Continued)

- Authorize the furnishing of Government property, except as required under the contract.
- Authorize subcontracting or the use of consultants.
- Approve shifts of funding between line items of the budget.
- Approve travel and relocation expenses over and above that provided for in the contract.
- Authorize the use of overtime.

YOU MAKE THE CALL!

- ***COR tells ABC contractor that the body armor would be better if the contractor used a different material – (i.e., titanium).***

- ***Is the government liable for costs associated with the product substitution?***

ANSWER

- If ABC contractor takes the COR's statement to be direction and substitutes the new material for the old, an unauthorized commitment results.
- An unauthorized commitment may result in a claim against the Government.
- To avoid an unauthorized commitment, the COR should first make it clear to the contractor that he or she does not have authority to give such direction and then submit a recommendation to the contracting officer to modify the contract.

Government Purchase Cards

Scope Of Purchase Card Use

In 2002, 230,000 Defense Department workers used purchase cards for $6.1 billion in goods and services.

Controls

- 10 U.S.C. § 2784 – Management of Purchase Cards
  - Imposes administrative and criminal penalties on misuse of cards
- DFARS 213.301
- Army Standing Operating Procedure, dated July 31, 2002

Army SOP

- Lists items unauthorized to purchase
- List types of vendors from whom cannot purchase
- List items requiring pre-approval

Army SOP Prohibits

- Cash advances and wire transfers
- Vehicle lease agreements
- Motor vehicle repair
- Long-term lease of land or buildings
- Gasoline and other fuel purchases
- Purchases of major telecommunications systems
- Construction services over $2000

Army SOP Prohibits

Cannot purchase bottled water service with purchase card

Improper Conduct

- Cardholders knowingly pay inflated prices
- Large fraudulent transactions split up and disguised as “split purchases”
- Bogus companies are established and co-owned by government cardholders and vendors

Improper Conduct

Vendors provide free merchandise, services, gifts, or portion of profit as reward or incentive as kickbacks.

- Gift prohibitions.
- Bribery.
- Illegal kickbacks.

GAO Report 02-732

Purchase Cards – Control Weaknesses Leave Army Vulnerable to Fraud, Waste, & Abuse

Eisenhower Army Medical Center, at Fort Gordon, Augusta, Georgia, had two fraud cases that were not identified by appropriate approving official review. ach case involved tens of thousands of dollars, with cardholders purchasing jewelry, clothing, and other items for their personal use.

Cardholders' Woes
Prosecution

- A (former) civilian director of the Pentagon's Graphics and Presentation Division used her Government purchase card to make 522 fake purchases from a Seattle company created by a fellow schemer solely to carry out the fraud.
- Payments by the Government for the "purchases" were made to the Seattle firm, but the co-schemer would simply cash the checks and split the "take" with the director.

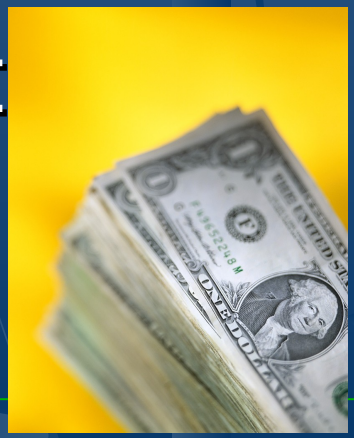
Prosecution
Penalties

The director was sentenced to:

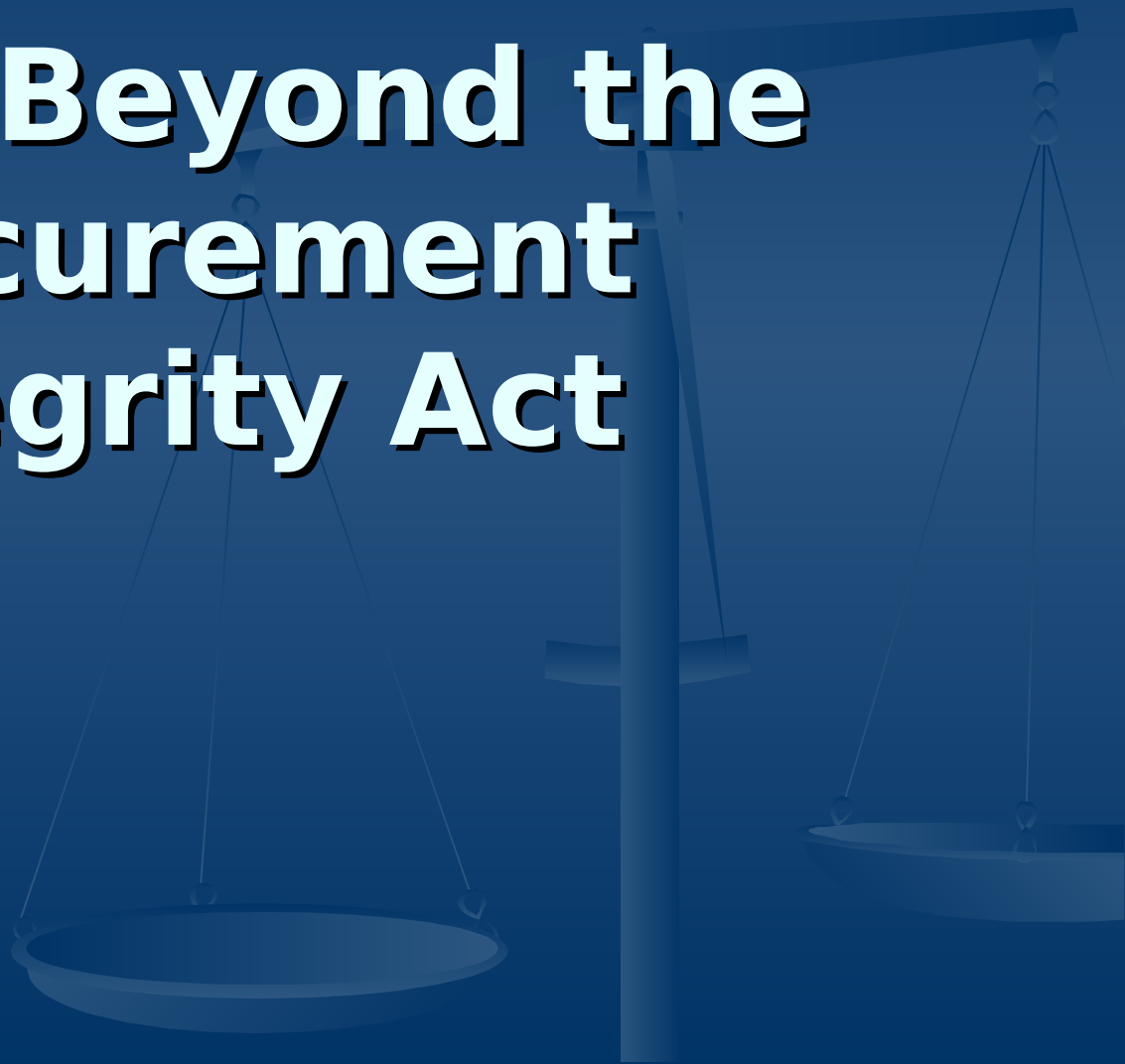
3 years and one month in pris

AND

$1.7 million in restitut



Going Beyond the Procurement Integrity Act



Concerns

- Bribery
- Gifts
- Allowing for “Time-Off”
- Misuse of Contractor Personnel
- Traveling with Contractors
- Recommendation and Awards for Contractor Personnel
- Organizational Conflicts of Interest
- Seeking Employment
- Working for Contractors after Government
- Filing Financial Disclosure Reports
- Ethics Decision Matrix

Applicable Law And Regulations

All federal employees should also be familiar with other statutory and regulatory prohibitions:

- Code of Ethics – 14 Principles
- Standards of Ethical Conduct for Executive Branch Employees 5 C.F.R. Part 2635
- The Joint Ethics Regulation (JER), DoD 5500.7-R.
- 18 United States Code Sections 203, 207, 208.

Bribery

Accepting a gift, even if nominal in value, in return for being influenced in the performance of an official act is

18 USC Section 201

Gifts

- Prohibited from accepting a gift:
  - Because of your position (remember bribe!)
  - From a prohibited source – Contractor employees are prohibited sources

- No solicitation for retirement or other gift for Government emp

Gift
Is it a gift? If not a gift, no prohibition

Non-gifts:

- Modest items of food and refreshments (like coffee and donuts) when not served as a meal.
- Prizes in contests open to the public.
- Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, intended only for presentation.
- Commercial discounts available to the public or to all Government civilian or military personnel.
- Anything you pay market value (i.e., face value).

Exceptions

Gifts of $20 or Less. Unsolicited gifts with a market value of $20 or less per source, per occasion, so long as the total value of all gifts received from a single source during a calendar year does not exceed $50. Does not apply to gifts of cash or investment interests (e.g., stocks or bonds). Employee may decline gifts to keep aggregate value at $20 or less, but may not pay differential over $20 to retain gift(s);

Exceptions

Gifts Based on a Personal Relationship. Gifts based on a personal relationship, such as a family relationship or personal friendship rather than the position of the employee. Relevant factors to consider in making the determination include history of the relationship and whether family member or friend personally pays for the gift.

Exceptions

Commercial discounts available to the general public or to all Government or military personnel. Would not apply to discounts to subgroups based on rank, position or organization. (See OGE Memorandum DO-99-001, Jan. 5, 1999, “Employee Acceptance of Commercial Discounts and Benefits”).

Exceptions

Gifts From Prospective Employers

Meals, lodging, transportation, etc,

IF *customa* ffere

. § 26 (e)(3)

Remember:

Regardless of any exceptions, it is always impermissible to:

- Accept a gift, in return for being influenced in the performance of an official act.

- Accept gifts from the same or different sources so frequently that a reasonable person would think you're using your office for private gain.

YOU MAKE THE CALL!

- ***The support contractor for your organization wants to offer ALL of the Soldiers and government employees of the organization free tickets to the home opener for the Washington Nationals! The contractor hopes that this will further promote the partnership b/w the Army and the contractor personnel. The tickets have a face value of $25 but the contractor paid $15/piece for the tickets.***

- **May the Soldiers and employees accept the tickets?**

ANSWER

- Contractor is a prohibited source - no gifts are permissible unless exception applies

  $20/$50 rule

  No – look to face value not what contractor paid

  Discount or benefit?

  No – offered only to those within the organization

  Personal Relationship?

  No – offered because of status

FOLLOW-UP

- Is there any way that the Soldiers or employees can accept the tickets?
- Yes – individuals can pay the contractor the face value of the ticket
  - If you pay market value (face value) for the ticket, it is not a gift
- Still may have appearance concerns
  - Ask the ethics counselor!

ALLOWING "TIME OFF"

ALLOWING “TIME OFF”

- Remember:
  - Federal Personnel System rules/regulations are inapplicable to contractor personnel
  - Contractor personnel time is “billed” to the government
- Procurement and Fiscal laws & regulations apply

YOU MAKE THE CALL!

- The holiday weekend is fast approaching and the officer-in-charge of the organization invokes the “59-minute rule” for all members of the office – including the contract support team who work with the Soldiers and government employees.

- Is it permissible to allow the contractor personnel to leave 59-minutes before their scheduled departure time?

ANSWER

- Decisions concerning “time off” are to be made by the contractor NOT the government
- Contractor personnel are paid pursuant to the terms of the contract with the Army – not according to federal personnel system rules/regulations
  - The contractor employee has no authority to modify the terms of the contract
  - Only certain government personnel have the authority to modify the terms of the contract

FOLLOW-UP

- **Exercise caution:**
  - **Organization Day**
  - **Holiday Party**
  - **Off-Site Conference**
  - **Training**
- **Coordinate with contracting officer**
- **Ensure that contractor personnel are informed**

Misuse of Contractor Personnel

Misuse of Contractor Personnel

- Prohibited from directing contractor personnel to:

Perform any tasks other than those in the contract

Misuse of Contractor Personnel

- This includes:
  - Picking up dry-cleaning, prescriptions, meals, etc.

  - Assisting with unofficial activities in support of non-federal entities.

YOU MAKE THE CALL!

- ***The day is going by fast and the boss has been tied up on a project. Bob, a former soldier and friend who now works for a contractor on the support contract, is going to the food court for lunch. You ask him to stop by "Chick-on-a-Stick" to pick up lunch for the boss.***
- Is it permissible to ask Bob to pick up lunch?

ANSWER

- Federal money is used to pay contractors for every task.
- To direct a contractor to perform a personal task is an improper use of Federal appropriations.
- May result in Anti-Deficiency Act violation.
- Need to contact contracting officer or specialist whether a particular use of contractor personnel is proper.

Other Considerations

- Prohibition on personal services contract
  - A contract that, by its express terms ***or as administered***, makes the personnel appear, in effect to be governmental employees.

- So, be cautious in directing contractor personnel to perform Federal functions.

Traveling with Contractors

Can Army and contractor employees share transportation?

- It depends. There are three scenarios.
  - Scenario 1 -- Army employee will perform official travel and contractor employee offers to let him or her ride along in a vehicle.
  - Scenario 2 -- Army employee will perform personal travel and contractor employee offers to let him or her ride along in a vehicle.
  - Scenario 3 - Army employee will perform official travel and offers to let contractor employee ride along in a vehicle paid for by the Army.

Scenario I

- Army employee will do official travel & contractor employee offers to let him or her ride in a vehicle. May the Army employee accept the offer?

- Answer: The Army employee may not accept the offer (i.e., the gift of official travel to the Army), unless there is legal authority that allows it. We will discuss the cases where gifts of official travel may be accepted.

When Permissible to Accept Official Travel from a Contractor

- Gift of travel from a tax-exempt organization
- Gift of travel from a foreign government
- Gift of travel to a “meeting” (under 31 USC 1353)
- Gift of travel to an event that is not a “meeting” (accepted under 10 USC 2601 as a gift to the Army)

- Travel to an event under an CAAS contract (not a gift)
- Travel contractor must provide IAW contract (not gift)
- Transportation integral to a site visit (not a gift)
- Sharing a taxi with a contractor employee (not a gift)

Scenario 1

Gift of travel to a “meeting”

- ***General Rule***: Under 31 USC 1353, a government agency may accept travel expenses from a non-Federal source for travel to a “meeting,”

“Meeting” means a conference, seminar, speaking engagement, symposium, training course, or similar event. [41 CFR 304-2.1]

Includes an event where the employee will participate as a speaker or panel participant focusing on his/her official duties or on the policies, programs or operations of the agency. [41 CFR 304-2.1]

Scenario 1

Criteria

- The meeting relates to the employee's official duties.
- The meeting ***takes place away*** from the government employee's official duty station.
- The government employee will attend the function in an official capacity.
- The payment would not cause a reasonable person to question integrity of agency operations.
- Acceptance of payment is approved by employee's travel-approving authority before travel begins.

What is Not a Meeting

A “meeting” does ***not*** include:

- a meeting or other event required to carry out an agency’s statutory or regulatory functions (i.e., a function that is essential to an agency’s mission) such as investigations, inspections, audits, site visits, negotiations or litigation;
- “promotional vendor training or other meetings held for the primary purpose of marketing the non-Federal source’s products or services,” ***or***
- long-term TDY or training travel. [41 CFR 304-2.1]

Reporting Travel Expenses

- Travel expenses accepted under 31 USC 1353 are a gift to the agency and do not have to reported on the government employee's financial disclosure report (SF 278 or OGE Form 450). [41 CFR 304-3.17]

- If a government employee receives over $305 in travel expenses for any one event, he or she must report the benefits received by completing the SF 326 and submitting it to his or her agency. [41 CFR 304-6.4 & 304-6.5] The SF 326 can be printed from the GSA website.

Travel to an event under a CAAS Contract

Army employees may ride in a vehicle paid for by the contractor if:

- The travel is under a Contractor Advisory and Assistance Services contract,
- The contract has a provision for direct reimbursement of the contractor for travel expenses, and
- The Army employees and the contractor employees are willing to share transportation.

Scenario 1

Contractor is Required to Provide Under Contract

"Transportation is acceptable if it is included in a contract between the Government and the contractor. It appears that contracts for on-site *inspections* typically contain a provision requiring the contractor to make available to the Federal employee reasonable assistance for carrying out those official duties. … Any contract provision requiring such "assistance" would appear to authorize acceptance of the transportation for official business in question."

Scenario 1

Travel to an event that is not a "meeting" under a fixed-price contract

If Army employees will travel to an event that does not fall within the definition of a "meeting" (such as a site visit), and the travel would be pursuant to a fixed-price contract, where there is no provision for direct reimbursement to the contractor for its travel expenses, it is ***impermissible*** for the Army employees and contractor employees to share transportation.

Scenario 1

Transportation Integral to a Site Visit

"If the contractor offers transportation within a single site, it may be acceptable as transportation *integral to* the site visit. Such transportation is not considered a gift, and there is no explicit regulation or statute authorizing acceptance. Generally, such transportation does not have an independent market value, is not otherwise available, entails unique capabilities, or is of nominal value. Examples include use of a contractor shuttle between buildings. . .. Factors also include safety, security, and the lack of alternative travel. When facilities are not contiguous, and transportation is not limited to contractor vehicles, transportation is most likely not integral to the site visit."

Scenario 1

Sharing a Taxi

- A DoD employee and a contractor employee are on official travel and would like to split the cost of a taxi ride to the airport. This is permissible.

- Sharing the cost of the taxi ride with the contractor is permissible because each traveler would pay his or her pro-rata share to the neutral provider of the transportation. The DoD employee should, however, consider whether sharing the taxi might constitute an appearance of a conflict of interest. For example, it may not be advisable for a contracting officer in the midst of a source selection to share a taxi with an employee of one of the offerors.

Scenario 1

Scenario 2 -- Army employee in contractor vehicle on personal travel

- An Army employee will perform personal travel and a contractor employee offers him a ride in a vehicle. May the Army employee accept the ride?

- Army employees are generally prohibited from accepting gifts from "prohibited sources," which includes both contractors & their employees.

Scenario 2 -- What is Personal Travel?

- "Personal travel" generally means:
  - Travel that is not "official business"
  - Travel for which the govt. will not reimburse you
  - Travel for which you may not use a GOV
- Examples of "personal travel" include:
  - Commuting between home and work
  - Driving off-base from your permanent duty station to go to lunch
  - Long sightseeing drives during the evenings or weekends while TDY

Scenario 3 -- Contractor employee in Army vehicle

- An Army employee will perform official travel and would like to offer a ride to a contractor employee in a vehicle that will be paid for by the Army (e.g., either a GOV or a rental car paid for by the Army). Is this permissible?

- ***General rule:*** is that an Army employee who is engaged in official travel in a vehicle that is paid for by the Army (including a GOV) may ***not*** permit a contractor employee to ride in the vehicle.

You Make the Call

- ***A contractor employee offers to drive an Army employee to lunch at a restaurant ten miles off-post in his personal vehicle***.

May the employee accept the ride?

Answer

- The Army employee may accept the ride if it fits within the exception of 5 C.F.R. 2635.204(a) (e.g., the $20 exception).

- ***Caution:*** There may be an appearance problem that requires discussion with an ethics counselor if, for example, this arrangement occurs frequently or the Army employee is making official decisions affecting the contractor.

RECOMMENDATIONS AND AWARDS FOR CONTRACTOR PERSONNEL

RECOMMENDATIONS FOR CONTRACTOR PERSONNEL

- Remember:
  - Impartiality
    - Employees shall act IMPARTIALLY and not give preferential treatment to any private organization or individual

      General Principle #8
  - Evaluation of performance of contractor
    - Evaluation of performance is a matter handled within contracting channels

YOU MAKE THE CALL!

- ***You are the administrative staff supervisor for an organization. The receptionist for your organization is a contractor employee. He has worked in support of the organization for 2 years and has done a terrific job. He has decided to pursue a college education and has asked you for a letter of recommendation discussing his job performance & work ethic. He intends to include the letter of recommendation with his college application.***

- Can you provide the letter of recommendation to the contractor employee?

ANSWER

- Impermissible to give preferential treatment to any non-federal entity
  - Would need to do the same for all other contractor employees
- The terms of the contract control
  - contract provides for the proper method to provide information on performance
  - discuss with contracting officer

Awards
And yes, this includes coins

- Awards programs are statutorily based
  - Military – 10 U.S.C. Sections 1124 and 1125
  - Civilian -- 5 U.S.C. Section 4511-4513

- Statutory Authority for individual contractor employees?
  - NONE

Awards

- DoD 1400.25-M, Subchapter 451
  - Honorary awards may be granted to private citizens, groups, or organizations that significantly assist or support DoD functions, services, or operations
- ***But, wait!!!!***
  - Persons or organizations having a commercial or profit-making relationship with DoD shall not be granted recognition.

COINS

- Query: May commander's coins be given to contractor employees?

ANSWER_

"Coins purchased with appropriated funds shall not be presented to contractor personnel."

DA Memo 600-70, para. 5d(2)

Organizational Conflicts of Interest

What is an Organizational Conflict of Interest (OCI)?

An "organizational conflict of interest" exists when a contractor is or may be unable or unwilling to provide the government with impartial or objective assistance or advice. An organizational conflict of interest may result when factors create an actual or potential conflict of interest on a current contract or a potential future procurement.

The two underlying principles are –

- Preventing the existence of conflicting roles that might bias a contractor's judgment

AND

- Preventing unfair competitive advantage

How Does OCI Arise?

- ***Biased ground rules cases*** . . . government contractor has opportunity to skew a competition in its favor
- ***Unequal access to information*** . . . access to non public information that would give it an unfair competitive advantage
- ***Impaired objectivity*** . . . government contractor would be in a position to evaluate itself or a related entity

FAR Part 9.5 Applicability

- Not limited to any particular kind of acquisition.
- OCI most likely to occur in contracts involving --
  - Management support services;
  - Consultant or other professional services;
  - Contractor performance of or assistance in technical evaluations; or
  - Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

Contracting Officer's Responsibility

- See FAR Section 9.504
- Must analyze planned acquisitions to:
  - Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
  - Avoid, neutralize, or mitigate significant potential conflicts before contract award.
- Should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses

Areas

- Providing systems engineering and technical direction
- Preparing specification of work statements
- Access to proprietary information
- Solicitation provisions, waivers and mitigation plans

Systems Engineering and Technical Direction

What does this cover:

Contractor provides systems engineering and technical direction for a system

But, does not provide overall responsibility for development, integration, assembly and checkout, or its production.

What is Systems Engineering?

- Includes a combination of substantially all of the following activities:
  - determining specifications,
  - identifying and resolving interface problems,
  - developing test requirements,
  - evaluating test data, and
  - supervising design.

What is Technical Direction?

- Technical direction includes a combination of substantially all of the following activities:
  - developing work statements,
  - determining parameters,
  - directing other contractors' operations, and
  - resolving technical controversies.

Prohibition

- ***Cannot***
  - Be awarded a contract to supply the system or any of its major components, or
  - Be a subcontractor or consultant to a supplier of the system or any of its major components

Preparing Specification of Work Statements

- Contractor ***cannot*** provide both an item and services and the corresponding –
  - Non-developmental item specifications

    OR

  - System or service work statement, unless it is the sole source or did not solely prepare SOW

YOU MAKE THE CALL!

The Navy awarded SSR an architect-engineering (A&E) contract to develop a master plan for replacing overhead electrical and cable lines with underground lines at Keesler Air Force Base, Mississippi. In its master plan, SSR had calculated the cost estimates the Navy used for the Keesler procurement. The Navy used SSR's master plan from the A&E contract as the statement of work for a follow-on procurement to implement changes to Keesler's electrical distribution system. The contracting officer informed SSR that it could not participate in the Keesler procurement because its work on the master plan created an organizational conflict of interest.

Was the contracting officer correct?

ANSWER

- Know the Cost, Know the Work, ***No*** Contract
- The GAO found that SSR's master plan formed the basis for the current statement of work and for the Navy's cost estimates on the procurement. Thus, the contracting officer had sufficient grounds to exclude SSR from the Keesler procurement because it had gained an unfair competitive advantage.

Providing Evaluation Services

- A contractor ***cannot*** evaluate its own offers for products or services, or those of its competitors, without proper safeguards to ensure objectivity to protect the Government's interests.

Obtaining Access to Proprietary Information

- Contractors performing advisory and assistance services for the Government must agree with other companies to protect their information for unauthorized use or disclosure so long as it remains proprietary and ***refrain from using the information for any purpose other than that for which it was furnished***.

Seeking Employment

Applicable

- Procurement Integrity Act
- 18 U.S.C. Section 208
- Joint Ethics Regulation
- Standards of Ethical Conduct for Executive Branch Employees

Seeking Employment
Procurement Integrity Act

- Participating personally and substantially
- Competitive procurement
- Valued in excess of simplified threshold (currently $100,000)
- You contact or are contracted by a bidder or offeror in the procurement

YOU MUST:

Requirements

- Promptly report the contact in writing to:
  - Your supervisor and
  - Ethics Counselor

    And
- Reject the offer, *or*
- Disqualify yourself from further involvement in the procurement

Seeking Employment
Conflicts of Interest

- You may **not** take any official action that affects a company with which you are negotiating for employment or have an arrangement concerning prospective employment
- JER 5-301 applies to National Guard and enlisted personnel

18 U.S.C. § 208
5 C.F.R. § 2635.402

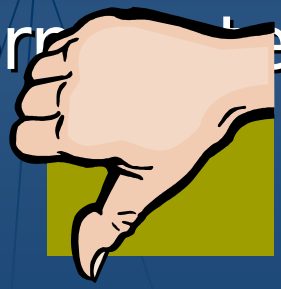
“Seeking Employment”

- 5 C.F.R.2635.603(b)
- You are “seeking employment” when you:
  - engage in negotiations
  - make unsolicited employment contact
    - includes sending resume
    - excludes requesting job application
  - respond to unsolicited proposal (except unconditional re

Termination of Seeking Employment

You are no longer “seeking employment” when:

- either party rejects proposal and discussions have terminated, or



- two months have passed after mailing resume and no response

Disqualification

To avoid violation:

- Take no action
- Written notice to supervisor (JER 2-204)
- Supervisor response:
  - Written
  - Recusal
  - Copy to Ethics Counselor & subordinates

RESTRICTIONS ON MILITARY PERSONNEL

- Employment with and/or compensation from foreign government
  - Must get approval from Service Secretary
- No civil office while on transition (formerly terminal) leave
- 6-month waiting period before working for DoD
  - This restriction is suspended indefinitely
- Permissive TDY issues

Post-Government Employment

Post-Government Employment Restrictions

Representational Restrictions

18 U.S.C. § 207

Prohibits representing another before U.S. Government with intent to influence

- Lifetime ban
- 2-year ban
- 1-year cooling-off period for senior employees
- 1-year ban on senior employees representing foreign entities

Lifetime Ban

- 18 U.S.C. § 207(a)(1)
- May not:
  - Communicate/appear on behalf of another
  - With “intent to influence”
  - Regarding a “particular matter”
  - Involving specific parties
  - Where participated “personally and substantially” as Federal employee
  - Behind-the-scenes assistance permitted

Definitions

- **"Particular matter" -- includes a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, or investigation. Generally, does not include rulemaking, formulation of general policy, standards or objectives, or other matters of general application.**

- **"Intent to influence" -- seeking some discretionary action, ruling, benefit, or approval. Does not include purely social contacts or requesting publicly available information.**

Definitions (Continued)

- Participate "personally and substantially" -- to participate directly and significantly by decision, approval, recommendation, rendering of advice or investigation. Includes actions of a subordinate if actually directed by the former employee.

2-Year Ban

- *18 U.S.C. § 207(a)(2).* May not, within 2 years of termination of Government service
  - Communicate/appear on behalf of another
  - With "intent to influence"
  - Regarding a "particular matter"
  - Involving specific parties
  - Under ***"official responsibility"*** during last year of Government service
- Behind-the-scenes assistance permitted

Definitions

"Official responsibility" -- direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

1-Year Cooling-Off Period

18 U.S.C. § 207(c)

- Applies to former senior employees(O-7 and SES Level 5 and above)
- Prohibits communication or appearance before ***former agency***, on behalf of another with intent to influence, on <u>any matter</u> where official action is sought

- Behind-the-scenes assistance permitted
- Communications to other DoD components permitted

RECAP

- Prohibitions found in ethics and procurement laws and regulations may prevent a Soldier or civilian employee from receiving compensation from a particular contractor after his or her government service.

- While it may be permissible for a Soldier or civilian employee to work for a particular contractor, it may be impermissible to work on a particular contract or in a particular segment of a contractor's operations.

YOU MAKE THE CALL!

- ***Six months ago, you retired after 30 years of federal service! For 5 years prior to your retirement, you were the program manager for the Hines Helicopter program. The Steelmark Corporation was the contractor for the program. A director of Steelmark approached you recently at a luncheon and began to discuss the possibility of employment with the company.***

- Would it be permissible for you to accept an offer of employment with Steelmark?

ANSWER

- **It depends**
- What are the particulars of the employment offer?
  - Would you be working for Steelmark on the Hines contract?
  - Would you be working in another segment of the Steelmark Corporation?
  - Would you act as a representative of Steelmark to the Army?
- Procurement Integrity Act

Public Financial Disclosure Filers

- Employees who complete a financial disclosure report (SF 278 or OGE form 450) still must receive ethics training once a year.
- SF 278 Filers must file termination SF 278
  - not more than 30 days after retirement date.
  - Penalty of $200 imposed for failing to fi

Ethical Decision-Making

10 Step Process

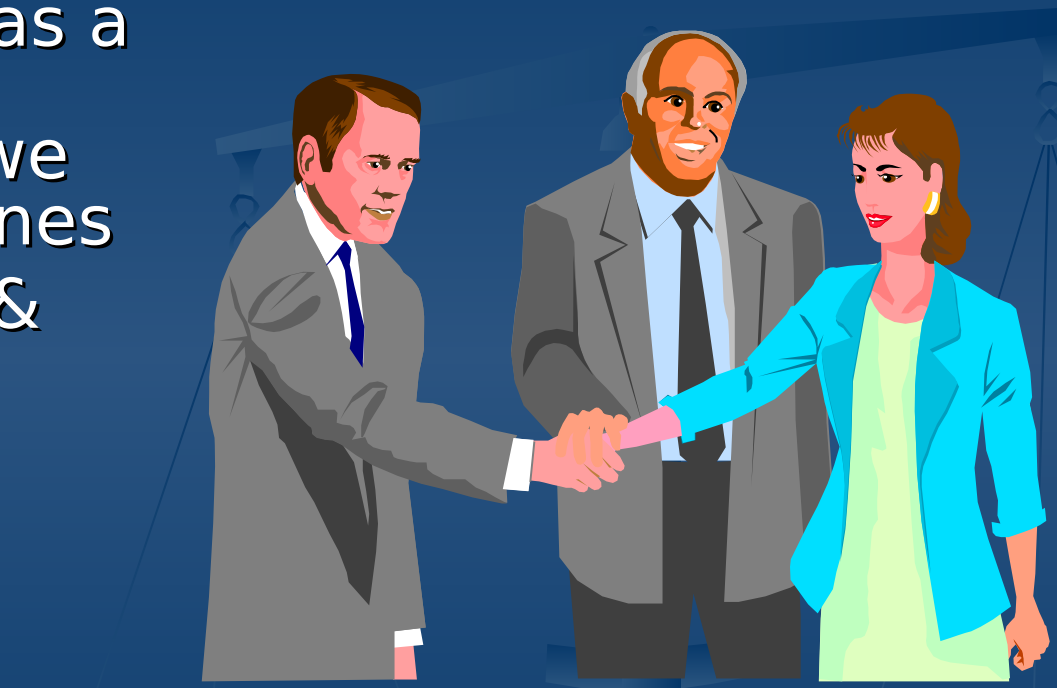
1. Define the Problem.
2. Identify the Goal(s).
3. List Applicable Laws or Regulations.
4. List the Ethical Values at Stake.
5. Name All the Stakeholders.

10 Step Process (Continued)

6. Gather Additional Information.
7. State All Feasible Solutions.
8. Eliminate Unethical Options.
9. Rank Remaining Solutions.
10. Commit To and Implement the Best Ethical Solution.

SUMMARY

- We may operate as a team with our contractors, but we are in different lanes
- Most ethics laws & regulations are inapplicable to contractors
- Be careful of appearance problems
- Ask your ethics counselor!



QUESTIONS?

Who to Call

- Insert name of Person to Contact if Has Questions
- Office telephone Number
- Email address